STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. 15,750
	)	
Appeal of	)	
	)	

INTRODUCTION

The petitioner appeals decisions by the Department of Social Welfare finding her ineligible for inclusion of certain items toward her spend-down for Medicaid and ineligible for payment of her Medicare premium.

FINDINGS OF FACT

1. The petitioner lives with her husband and daughter. They all receive Social Security Disability benefits, the petitioner $545 monthly, her husband $556, and her daughter $202. The petitioner's husband also receives Workers' Compensation benefits of $212 per month. Their total family income from these benefits is $1515 per month.

2. The Department determined that this income put the petitioner and her husband over-income for Medicaid benefits (using an $825 maximum for a family of three) and established a spend-down amount for them. The daughter was found eligible for Medicaid under a different standard for children (the Dr. Dynasaur program.) The petitioner was notified February 12, 1999, that a spend-down amount had been established for herself and her husband of $975.96 each for the period from November 1998 through April 1999. The notice also stated that health insurance premiums and over

the counter medications (OTCs) recommended by her doctor would be anticipated and deducted up front for the six-month period. She was notified that she had received a $262.80 advance deduction for her $43.80 per month Medicare premium, a $194.92 deduction for anticipated over-the counter-medications based on figures she had provided, and $490 for amounts spent on eyeglasses. Those figures had lowered her and her husband's spend-downs to $502.10 each.

3. The establishment and amount of the spend-down is not disputed by the petitioner but the Department's action in counting her medical expenses towards that spend-down is. At issue is whether Lactaid milk and tablets needed by the petitioner and her daughter should count toward the spend-down and whether special dietary items, mainly food which does not contain sugar, some of which is expensively packaged, used to control her husband's diabetes should be included. Also at issue is whether any of these expenses can be anticipated over the six month period so as to reduce the spend-down in a more rapid manner.[1]

4. The Department has reiterated its agreement to allow anticipated medical expense deductions for all OTCs, including the Lactaid milk and tablets used by the

[1] It is not clear why this dispute arose as the Department has agreed to anticipate all over the counter medications recommended by the family's doctor. It appears that there was some kind of a communication breakdown between the petitioner and her worker that led her to believe that OTC expenses had not or would not be anticipated.

petitioner and her daughter. The petitioner estimated those costs at $112.76 per month. The Department has refused to deduct the costs of foods needed to control diabetes because they are not classed as medications.

5. The petitioner was notified on February 20, 1999 that Medicaid would no longer pay for her Medicare costs effective July 1. No reason for this action was given in the notice. The petitioner takes issue with that decision because she received a publication from the federal Health Care Financing Administration (HCFA) which said that a two person family with an income under $1602 per month qualifies for this benefit. Because of this, she believes that her three person family would easily be eligible for such payment.

ORDER

The decision of the Department to deny a deduction for food purchased by the petitioner's husband to control his diabetes is affirmed. The decision of the Department to terminate coverage of the petitioner under the Medicare cost-sharing program is reversed and the matter is remanded to the Department to determine her eligibility in accordance with the rules adopted at M200.

REASONS

The only issues which remain for adjudication in this matter are whether the petitioner's payment for foods to control her husband's diabetes should be included as an over-the-counter medication expense which can be anticipated and deducted to meet a spend-down; and, whether the petitioner's Medicare premiums should be paid by the Department.

With regard to the first issue, the Medicaid regulations provide that "a person who passes all eligibility tests, except that his or her Medicaid group's countable income. . .exceeds the applicable Protected Income Level (PIL). . .may qualify for Medicaid coverage by using (spending down) the excess amount." M 400.
The regulations provide for calculation and reduction of the excess amount as follows:

> An individual's spend-down is the difference between his or her total countable income for the accounting period [six months] and his or her total protected income according to standards for the same period. . . .
>
> Eligible medical expenses must be deducted from countable income in the following order:
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> 1. Health insurance expenses. . .
>
> 2. Non-covered medical expenses. . .
>
> 3. Covered medical expenses. . .that exceed limitations of amount, duration or scope of services covered. . .
>
> 4. Covered medical expenses. . .that do not exceed limitations on amount, duration or scope of services covered which are incurred by a member(s) of the

> Medicaid group or a financially responsible relative.
> . . .
>
> In no case should anticipated medical expenses other than health insurance expenses or the estimated cost of medically necessary over-the-counter drugs be deducted before they are actually incurred. An expense is incurred on the date liability for the expense begins. Anticipated health insurance expenses may be allowed if it can be reasonably assumed that the coverage will continue during the accounting period.
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> M423

The regulations describe "covered medical services" as any expense which Medicaid would ordinarily pay for an eligible person. M433. The Medicaid regulations specifically prohibit the program from paying for "non-drug" items which by definition specifically include "food products and food supplements" and "sugar substitutes." M811.1 Therefore, food products purchased to control diabetes cannot be deducted under paragraphs three and four above as the type of medical service that Medicaid would normally pay for.

If the petitioner can receive a deduction for her husband's food items, it would have to fall under the category in paragraph two of a "non-covered" medical expense, that is one that Medicaid would not normally pay but which may still be considered a "medical expense." The regulations describe such expenses as follows:

> A deduction from applied income is allowed for necessary medical and remedial care for medical services which are recognized by State Law but are not covered by the Medicaid Program. In determining whether a medical expense meets these criteria, the Commissioner may require a Medicaid applicant to submit

> medical or other related information needed to verify that the service for which the expense was incurred was medically necessary and was a medical or remedial expense. These medical expenses include but are not limited to the services listed below:
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> - Level III care provided in a hospital setting.
> - Private duty nursing services.
> - Dental care for persons age 21 and over.
> - Hearing aids and examinations for prescribing and/or fitting them for persons age 21 and over.
> - Over the counter drugs and supplies.
> - Personal care services received in an applicant's own home or in a Level III or Level IV Residential Care Home, as described below.
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> . . .

M432

This regulation does not specifically address whether money spent for common foods purchased to control medical conditions can be deducted as a non-covered medical expense. There is no category for food substances per se. There is a category for drugs or medical supplies. Those terms are defined in another section of the Medicaid regulations as follows:

> Pharmaceutical items include drugs, medicine chest supplies, vitamins and related items which are normally obtained through appropriately licensed pharmacies. Medical supplies and equipment include prosthetic devices, durable and non-durable equipment for care of the ill or injured, medical supplies and similar items which may be obtained from a pharmacy, hospital-surgical supply service or home health agency. . . .

M800

The above definition is a persuasive guide as to what the Department means when it used the category "drugs and supplies" in its non-covered items regulation. To be sure, the petitioner's purchase of food is done with a medical purpose in mind. However, it is not the kind of item which is normally purchased in a drug store or other place selling medical remedies, as the regulation seems to contemplate. The item at issue is common food, purchased in a grocery store. There is nothing in the above regulation which could reasonably be read as categorizing common food as medical drugs or supplies. Therefore, it must be concluded that the food is not in the nature of a drug or medical supplies as that term is used in the regulation.

The language of the regulation defining non-covered expenses does indicate that other medical expenses could be considered which are not necessarily listed in the regulation. The Department apparently has some degree of discretion to include other items from the language of this regulation. The issue then becomes whether the Department abused it discretion in refusing to allow deductions for common food, even when it is purchased to control a medical condition. It must be concluded that it has not. It is not uncommon for individuals to address a large number of medical conditions, from heart disease, high blood pressure and cholesterol irregularities to diabetes and allergies by modifying the kinds of food they eat. This being so, any

individual who claims that they eat certain foods for medical purposes could ask that their monthly food bill be deducted from their income. Since all individuals have to eat, the Department would be placed in the position of deducting the entirety of some persons's food bills while others with a "normal" diet, but who still have to purchase food, would receive no deduction at all. It cannot be said that the Department has drawn an irrational line in refusing to deduct the cost of common food, even when purchased for medicinal purposes.[2] It must be concluded that the Department acted in accordance with its regulations when it denied the petitioner a medical expense deduction for food eaten by her husband to control his diabetes.

The second issue raised by the petitioner is whether her Medicare premiums should be paid by the Department. The Department has adopted a regulation at M200 which requires the Medicaid program to pay certain Medicare expenses (premiums, deductibles and co-insurance) for certain individuals who are members of a listed group of low-income Medicare beneficiaries. The regulations, through reference to the companion procedures manual which contains the income limits, provide that a family of three can be eligible if they have less than $2025, and a family of two can be

[2] This discussion does not address the deductibility of extraordinary food supplements and substitutes not ordinarily used by persons without a medical condition such as the permitted Lactaid milk and Sustacal (liquid protein) which is allowed under the regulations as a drug. See M811.1

eligible with less than $1613 per month. P-2420 B4. The petitioner's family income at $1,515 per month is even less than the maximum for a family of two.

The Department concedes that the petitioner and her family may meet the financial eligibility guidelines for Medicare cost sharing under this program as well as other program requirements set out in the regulation. However, the Department has not considered the petitioner's financial eligibility because it claims that the petitioner and her family are barred from receiving assistance under an additional requirement imposed January 1, 1998. This new requirement allows payment only for low-income Medicare beneficiaries who "do not receive other federally funded medical assistance under Vermont's Medicaid state plan (such as Medicaid, VHAP, VHAP-Pharmacy)". This additional requirement does not appear in the policy manual but rather in a policy interpretation memorandum dated April 15, 1998. The Department claims that this new requirement is an impediment for this family because even though no evidence was presented that they actually receive VHAP or VHAP Pharmacy benefits, they are disqualified even if they are "eligible" for such benefits.

The Department's imposition of this new requirement on the petitioner, or indeed anyone in her position, is untenable. The policy memorandum has not merely interpreted an existing policy, as it purports to do, but has created an

entirely new requirement for eligibility. (Copies of both the policy pages and the policy interpretation are attached hereto.) The creation of a new eligibility requirement can only be accomplished through the procedure for the adoption of rules by an administrative agency at 3 V.S.A. э 836 et seq. The requirement's absence from the policy manual indicates that these procedures were not followed.[3] Therefore, this new requirement does not have the force of law.[4] This matter is remanded to the Department to determine the petitioner's eligibility for Medicare cost-sharing benefits using the rules adopted at M200 of the Medicaid manual and no others.

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[3] The regulation states that any change in the income and resource limits will appear in the procedures section of the manual. This kind of change is commonly accomplished without a change in regulation because the numbers are indexed by law to the federal poverty guidelines which are adjusted yearly and reprinted in the procedures manual. The kind of change which occurred here is one which has an adverse effect on recipients which, as the Department itself acknowledges in M200, "will be accomplished only by following the Administrative Procedures Act process for regulatory changes. M200.

[4] The Department's failure to cite any reason for the termination of the petitioner's eligibility in its notice, aside from being illegal, probably occurred because there was no regulation which the Department could cite for the proposed action.